

NO. 81107-5

(Formerly Court of Appeals No. 24784-8-III & 25007-5-III)

SUPREME COURT OF THE STATE OF WASHINGTON

THERESA AMBACH,

Respondent,

v.

H. GRAEME FRENCH, M.D. and JANE DOE FRENCH;
THREE FORKS ORTHOPAEDICS, P.C.; et al.,

Petitioners.

RESPONDENT'S MOTION TO STRIKE

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I. INTRODUCTION

Respondent/Plaintiff Teri Ambach respectfully requests that the Court strike the portions of Petitioner/Defendant Dr. Graeme French's¹ Supplemental Brief that are, by his own admission, beyond the scope of review on appeal. *See Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 671, 63 P.3d 125 (2003). There is one question before the Court: whether the damages Ms. Ambach alleges (e.g., the cost of an unnecessary surgery) satisfy the "injury to . . . business or property" element under the Consumer Protection Act ("CPA").² Despite acknowledging the limited scope of this appeal, Dr. French devotes just two pages of his Argument to the issue presented, and dedicates the remaining eight pages to novel legal questions that he admits no party has raised *to date*. Dr. French is either unaware of, or has chosen to disregard, Rule of Appellate Procedure ("RAP") 13.7(b). Either way, Dr. French's

¹ For ease, Respondent refers to Petitioners/Defendants Dr. French, Jane Doe French and Three Forks Orthopedics, collectively as "Dr. French."

² As the Court is aware, a consumer must satisfy five elements to make out a *prima facie* case under the CPA: (1) an unfair or deceptive act or practice (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property, and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986) (discussing RCW 19.86.020).

conduct would unfairly deprive Ms. Ambach of the opportunity for *both* parties to be heard before this Court on the issues raised.

The Court should strike the non-conforming sections of Dr. French's Brief, and reject any request on his part to file a revised Supplemental Brief. By Dr. French's own account, he has "already submitted substantial briefing" on the issue presented. Pet'r Supp. Br. at 3, n.1. That Dr. French failed to exhaust the page limit in his most recent filing and spends so little time on the subject of Ms. Ambach's "injury" and attendant damages only underscores that he has nothing more to say on the subject. Respondent respectfully requests that the Court award reasonable fees and costs associated with the filing of this motion for Dr. French's violation of RAP 13.7(b). RAP 18.9; *Pugel v. Monheimer*, 83 Wn. App. 688, 693, 922 P.2d 1377 (1996).

Even if the Court considers Dr. French's improperly raised issues, the arguments are misplaced and confused, and the questions not ripe for review. Although the Brief is somewhat unclear as to what issues Dr. French is now asking this court to address, it would seem that Dr. French's newly raised issues would require the Court to make a determination on at least two *additional* elements of Ms. Ambach's CPA claim: the "unfair or deceptive act or practice," and "causation" elements. No question exists

for the Court on these CPA elements because Dr. French *stipulated* that the trial court would not consider them. CP 58-60.

The procedural posture of this appeal bears repeating: Dr. French's Supplemental Brief presents nothing for the Court to review because *no court has ever had occasion to make a determination on the CPA elements Dr. French would now have this Court consider for the first time. See RAP 2.2, 2.4, 13.7.* Ms. Ambach can only conclude that Dr. French's newly substituted counsel failed to familiarize himself with the procedural history in this case. Whatever the reason, the Court cannot and should not reach the issues in Sections IV.A, B, C (pp. 6-13)³ and related material at pages 4-5 and 15-16 of Dr. French's Supplemental Brief.

II. BACKGROUND

For purposes of this Motion to Strike, the most significant aspect of the procedural history is found on pages 58-60 of the Clerk's Papers. These three pages contain a stipulation that only one element of Ms. Ambach's CPA claim was ripe for adjudication at summary judgment.

³ The last two lines and Section heading "D" on page 13 refer to damages, which Respondent agrees is properly before the Court.

That is, on June 25, 2004, Dr. French agreed to limit his motion for summary judgment to the question of whether Ms. Ambach could “demonstrate any injury to [her] business or property.” CP 59. Dr. French *withdrew* his motion as to the other basis on which he sought dismissal – i.e., Ms. Ambach’s ability to implicate the entrepreneurial aspects of the Dr. French’s practice. CP 59; *see also* CP 45-57 (French Sum. J. Mot.); CP 236-248 (French Reply).

It follows that every court to consider Ms. Ambach’s CPA claim has considered solely the question of whether her alleged damages support a cognizable CPA “injury.” CP 285-290 (Tr. of Sum. J. Hr’g); CP 249-251 (Order); CP 272-273 (Order Den. Recons.); *Ambach v. French*, 141 Wn. App. 782, 789-90, 173 P.3d 941 (2007).

Likewise, Dr. French’s “Issues Presented for Review” in his Petition centered on the “injury” element of Ms. Ambach’s CPA claim and with it, her allegation of damages:

A. In the context of a medical malpractice action, do personal injury damages such as medical expenses satisfy the CPA’s “injury to . . . business or property” requirement?

B. Should discretionary review be granted under RAP 13.4(b)(2) because the decision of the Court of Appeals finding such expenses as sufficient to satisfy the CPA element conflicts with other decision [sic] of the Court of

Appeals, including *Stevens v. Hyde* . . . and *Michael v. Mosquera-Lacy* . . . ?

C. Should discretionary review be granted under RAP 13.4(b)(4) because the issue as to whether personal injury damages in the context of a medical malpractice action is one of substantial public interest that should be decided by the Supreme Court?

Pet. at 5.

III. ARGUMENT

A. By His Own Admission, Dr. French Presents Matters Beyond The Court's Scope Of Review.

When the Supreme Court accepts review of a Court of Appeals' decision, it does not open the floodgates to consider any and all issues of the parties' choosing; rather, RAP 13.7(b) limits the scope of review to "only the questions raised in . . . the petition for review and the answer, unless the Supreme Court orders otherwise." RAP 13.7(b); *see also Denaxas*, 148 Wn.2d at 671 (construing RAP 13.7(b)). In *Denaxas*, for example, the Court held that an issue with respect to a dismissed counterclaim first raised in a supplemental brief was not properly within the scope of review. *Id.* at 671. Going further, this Court has read RAP 13.7(b) to exclude from review constitutional issues if the party fails to set them forth in the "issues presented" portion of the petition, as opposed to the body of the brief. *State v. Collins*, 121 Wn.2d 168, 178-79, 847 P.2d

919 (1993). The proper remedy when a party presents issues for the first time in a Supplemental Brief is to strike the non-conforming portions. *See State v. Korum*, 157 Wn.2d 614, 625, 141 P.3d 13, (2006) (granting motion to strike portions of opponent's Supplemental Brief filed in contravention of RAP 13.7(b)).

Here, Dr. French's Supplemental Brief presents a host of new issues related to Ms. Ambach's CPA claim that *no* party has raised at any time, let alone Dr. French in his "Issues Presented for Review." In fact, Dr. French expressly acknowledges this, and invites the Court to consider the new material in Sections IV.A, B, and C of his Argument (and scattered elsewhere in his Brief) precisely "*because* they were not briefed by the parties in the trial court or the Court of Appeals." Pet'r. Supp. Br. at 3.⁴ Nowhere in his Brief – filed simultaneous to Respondent's – does Dr. French allow that such conduct might impede Ms. Ambach's due process rights.

Perhaps most surprising about Dr. French's submission is that in the last round of appellate briefing, it was *Dr. French* who called for the

⁴ A side-by-side comparison between the Issues Presented for Review in the Petition and those listed in Dr. French's Supplemental Brief make the point clear. *Compare* Pet. for Rev. at 5 (Issues Presented), *with* Pet'r Supp. Brief at 1-3 (Issues Presented), *and id.* at 6-13 (Argument Sections IV.A – IV.C).

strictest compliance with the scope of review under RAP 2.4 ("Scope of Review of A Trial Court Decision"). At the Court of Appeals, Dr. French (by prior counsel) moved to strike portions of the *background* section and two pages of argument in Ms. Ambach's opening brief on the basis that it strayed beyond the scope of review by discussing matters related to the entrepreneurial aspects of Dr. French's practice. In that motion, Dr. French reminded the Court of Appeals that, in his words, "*the only element* of the [CPA claim] at issue in this appeal is the '*injury* to . . . business or property' requirement." The Court of Appeals agreed, and granted his motion to strike.

Evidently, Dr. French no longer feels bound by the Rules of Appellate Procedure governing the scope of review, now that he is the party seeking relief from an adverse decision. In fact, Dr. French readily admits that he presents issues for the first time in his Supplemental Brief that he did not raise in his Petition (or for that matter, at any other time). As such, the issues in Sections IV.A, B, C and other miscellaneous portions (pp. 4-5, 15-16) of his Brief are unquestionably beyond the scope of review. See *Denaxas*, 148 Wn.2d at 671. What is more, Dr. French acknowledges that only the CPA element of "injury" is on appeal, but

dedicates just two pages to that issue, and otherwise refers the Court to his Petition for Review for further discussion. *Id.* at 3, n. 1.

Accordingly, the Court should strike the non-conforming portions of Dr. French's Supplemental Brief, *see Korum*, 157 Wn.2d at 625, and deny any request for additional briefing. Respondent further requests that the Court award her reasonable fees and costs associated with the filing of this motion for Dr. French's violation of RAP 13.7(b). RAP 18.9(a); *Pugel*, 83 Wn. App. at 693 (awarding fees pursuant to RAP 18.9 to aggrieved party who was forced to file a response to untimely motion that sought affirmative relief beyond the scope of review).⁵

B. Dr. French's Extraneous Arguments Presented For The First Time In His Supplemental Brief Go To Issues That Are Not The Subject Of The Trial Court's Ruling Or The Court Of Appeals' Holding.

Should the Court reach the merits of Dr. French's newly raised issues, it will not find a single question that the trial court had the opportunity to consider, and therefore no portion of an appealable order or final judgment to review. *See generally* RAP 2.2, 2.4. Ignoring these additional procedural infirmities, Dr. French proceeds with a discussion of

⁵ Respondent attaches for the Court's review a declaration from counsel Kristin Houser supporting the request for attorneys' fees and costs associated with the filing of this motion.

what he contends are the “findings” and rulings of the Court of Appeals on CPA elements the appellate court did not (and could not) consider, and which the parties agreed were not at issue before the trial court.⁶ Ms. Ambach addresses each of these in turn.

1. Section IV.A Presents Issues Related To A CPA Element (“Unfair or Deceptive Act”) That (Until Now) No Party And No Court Has Considered Ripe For Adjudication Or Review.

Dr. French states that the Court of Appeals ignored binding precedent when it “ruled that Dr. French’s alleged unnecessary surgeries [] precipitated CPA jurisdiction, merely because he allegedly performed them for ‘financial gain.’” Pet’r Supp. Br. at 6. Although somewhat unclear, it seems that Dr. French would now like to challenge the “unfair or deceptive act or practice” element of Ms. Ambach’s claim. That is, Dr. French contends that the Court of Appeals applied only the second of what he terms two “conjunctive predicates” of Ms. Ambach’s claim: “[1] an unfair or deceptive act or practice [2] that occurred in the conduct of trade.” *Id.* at 7 (citing RCW 19.86.020). From here, Dr. French contends that the Court of Appeals erred when it “ruled” that Ms. Ambach satisfied

⁶ Again, although Dr. French readily admits the fact that these issues “were not briefed by the parties in the trial court,” Pet’r Supp. Br. at 3, he has apparently forgotten *why* (i.e., the parties’ stipulation at CP 58-60).

CPA jurisdiction based solely on her allegation that Dr. French had a financial motive in performing an unnecessary surgery, when it did not require a “showing” that Dr. French *also* committed an unfair or deceptive act. *Id.* at 8-9. Dr. French acknowledges that Ms. Ambach alleged an unfair or deceptive act in her Complaint, *id.* at 4; his argument here seems to be that something more was required on appeal.

Dr. French is mistaken on several levels. First, nowhere did the Court of Appeals hold that a “mere allegation” of negligent conduct performed for financial gain satisfies a *prima facie* case under the CPA. There is no language to this effect that could constitute a decision of the court. The verbiage about which Dr. French complains occurs in the *Ambach* court’s contextual summary of CPA caselaw regarding consumer claims arising in the context of medical services, not in the court’s analysis of Ms. Ambach’s claim. Pet’r Supp. Br. at 3, 5 (citing *Ambach*, 141 Wn. App. at 787-88).⁷ The language is, by any definition, dicta and not entitled to weight – even if it says what Dr. French contends (it does

⁷ It appears that Dr. French believes the following language in the Court of Appeals opinion constitutes rulings by that court: “Ms. Ambach argues Dr. French performed unnecessary surgeries for financial gain that triggered both a negligence claim and a CPA claim because the jury could decide whether the surgeries were either negligent or for financial gain,” Pet’r Supp. Br. at 5 (quoting *Ambach*, *supra* at 788), and “As in *Quimby* and *Wright*, the alleged conduct here fell within the entrepreneurial aspects of Dr. French’s practice,” *id.* at 6 (same).

not). The actual, narrow *holding* of the Court of Appeals on the sole issue presented comes after the summary of CPA caselaw, following this charge: “[w]e must consider whether the damages alleged by Ms. Ambach constitute injury to ‘business or property’ recoverable under the CPA.” *Ambach*, 141 Wn. App. at 789.

Dr. French is further mistaken that the Court of Appeals made any ruling that even remotely conflated or eliminated the CPA’s requirement that a consumer “show” an “unfair or deceptive act.” The Court of Appeals, in fact, begins its analysis with a recitation of all five elements of a prima facie case. *Id.* at 787. It made no “finding” or ruling with respect to four of the five elements because, simply enough, “Dr. French *conceded* that other prongs of the [CPA] test were met.” 141 Wn. App. at 789 (emphasis added). And with no dispositive motion on the issue, Ms. Ambach’s “mere allegation” that Dr. French engaged in unfair or deceptive acts was all that was required of her at summary judgment, and (not surprisingly) on appeal.

Had the *Ambach* court made the sweeping decision that Dr. French portrays, surely he would have mentioned the issue in his Petition for Review to this Court. He did not, for reasons he fails to explain, but which in any event could not justify a detour from the course of this

litigation. Dr. French's attempt in his Supplemental Brief to construct new legal theories from CPA elements that the parties set aside long ago is confused, contravenes basic appellate procedure, and is unfair to Ms. Ambach.

Finally, underlying Dr. French's discussion is an apparent belief that the Court of Appeals was the proper forum to review the entirety of Ms. Ambach's prima facie case – as if on a dispositive motion. The order on appeal⁸ was the trial court's grant of summary judgment on Ms. Ambach's CPA claim, *see generally* RAP 2.2, 2.4, in which the court concluded that Ms. Ambach's claim failed because she stated no cognizable injury. The Court of Appeals' scope of review was thus limited "to the issues raised by that motion." *See, e.g., State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002).

The appeal process, as this Court is aware, is not an opportunity to move for summary judgment or to seek dismissal of claims or parts of claims that a defendant failed to raise below. Indeed, it is difficult (if not impossible) to imagine how an appellant could make a "showing" on a

⁸ To be clear, Ms. Ambach moved for discretionary review (later consolidated in a direct appeal) of an order granting CR 11 sanctions against trial counsel, thereby triggering review of the underlying order subjecting counsel to sanctions. *See* RAP 2.4(b). The underlying order at issue is the trial court's order granting summary judgment of Ms. Ambach's CPA claim.

record that is, by definition, incomplete (i.e., because there is no trial court ruling on the issue and the matter is therefore not on appeal). Said another way, Ms. Ambach would be hard-pressed to make an evidentiary showing that Dr. French committed an unfair or deceptive act or practice on a set of Clerk's Papers that contain no rulings, testimony, transcripts, declarations, exhibits, or any other documents on the subject.

Ms. Ambach welcomes the opportunity to present her case to the trier of fact; however, she adamantly opposes Dr. French's attempt to dispense with an element of her claim without a full and fair opportunity to be heard.

2. The Policy Arguments In Section IV.B And In The Conclusion Have No Legal Or Factual Support.

Section IV.B (pp. 9-11) of Dr. French's Supplemental Brief summarizes policy arguments related to the issues in Section IV.A, discussed above. In essence, Dr. French argues that the Court of Appeals' "ruling" means that all doctors that work on a for-profit basis will be subject to "CPA jurisdiction" whenever a plaintiff brings a "garden variety" malpractice claim (because, according to Dr. French, they will no longer have to show an unfair or deceptive act or practice). Pet'r Supp. Br. at 10. For reasons stated above, Dr. French's portrayal of the Court of

Appeals' holding is simply wrong, and therefore the policy issues he raises are not present.

In a related discussion, Dr. French suggests that the result of *Ambach* is that doctors' "personal fortunes will be at risk every time a plaintiff asserts an ancillary CPA claim [to a malpractice suit]." *Id.* at 16. This "huge Damocles' sword" awaits every physician, according to Dr. French, because "malpractice insurers do not cover Consumer Protection claims." *Id.* at 15-16. Setting aside Dr. French's mistaken premise regarding the import of *Ambach*, Dr. French's sweeping prediction about physicians' insurance is not supported anywhere in the record; instead, he cites to one case involving a coverage dispute where the court construed *one* doctor's malpractice policy. *Id.* (citing *Podiatry Ins. v. Isham*, 65 Wn. App. 266, 268, 828 P.2d 59 (1992)). Citation to *one* policy referenced in *another* case does not make for a record on *this* appeal, nor does it make malpractice insurance an issue for this Court to consider. Even were the Court to accept the premise that physicians cannot obtain coverage for CPA violations, the Court should reject Dr. French's implication that because a professional's misdeeds are uninsurable, he should gain immunity under the law.

In any event, the holding of the Court of Appeals does not ease the requirements for injured persons who wish to bring CPA claims against doctors, and thus Dr. French's policy arguments are unwarranted.

3. Section IV.A Presents Issues Related To A CPA Element ("Causation") That (Until Now) No Party And No Court Has Considered Ripe For Adjudication Or Review.

Finally, Dr. French takes issue with the opinion of Ms. Ambach's medical expert, which is primarily a challenge to Ms. Ambach's ability to show a causal connection between Dr. French's unfair or deceptive act and her injury (i.e., the "causation" element of a CPA claim). He asserts that Ms. Ambach's medical expert "made it clear that her professional negligence claims fell squarely within the parameters of the Act [when] [h]e asserted that Dr. French performed 'unnecessary surgeries' upon Ms. Ambach 'that resulted from Dr. French's failure to follow the accepted standard of care.'" Pet'r Supp. Br. at 12. In other words, Dr. French argues that Ms. Ambach's expert testified that the surgeries "arose solely from" (i.e., were caused by) health care provided to her by Dr. French, as opposed to dishonest or deceptive practices, and thus her sole remedy is a negligence action. *Id.* at 12-13.

Causation (a question of fact, per Dr. French's stipulation) is not on appeal, was never the subject of a trial or appellate court ruling, and is therefore not properly before this Court. The Court should strike this portion of Dr. French's Brief, or in the alternative, find there is nothing to review.

To be clear, some portions of the testimony from Ms. Ambach's medical expert were also used to support her medical negligence claim. For example the opinion that Dr. French's conduct fell below the standard of care when he advised Ms. Ambach to undergo a medically unnecessary procedure, supports both a malpractice claim and Ms. Ambach's allegation that her doctor was motivated by money, and not her wellbeing. As detailed in Ms. Ambach's Answer to Dr. French's Petition for Review and in her Supplemental Brief, the factual overlap does not mean that every medical malpractice claim provides the predicate for a CPA claim. Again, Ms. Ambach, like any injured consumer, would have to show all five elements of a CPA claim – including a causal relationship between the injury (the cost of an unnecessary surgery) and an unfair or deceptive act or practice by Dr. French.

IV. CONCLUSION


Ms. Ambach respectfully requests that the Court strike the portions of Dr. French's Supplemental Brief that go beyond the scope of review on appeal and therefore contravene RAP 13.7(b): Sections IV.A, B, and C, and portions at pp. 4-5, 15-16. Ms. Ambach seeks recovery of her reasonable attorneys' fees and costs associated with the filing of this motion, and requests that the Court deny any request by Dr. French to file a revised Supplemental Brief. *See Houser Decl.*

On the merits of Dr. French's newly submitted material, the Court will not find any questions to review because neither the trial court nor the Court of Appeals have had an opportunity to adjudicate any of the material presented.

RESPECTFULLY SUBMITTED this 16th day of **December**,

2008.

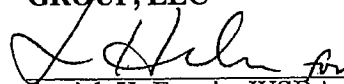
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 17th day of December 2008, true and correct copies of the forgoing Motion to Strike were served on the persons hereinafter named by depositing said copies in the United States mail, postage prepaid, addressed as follows:

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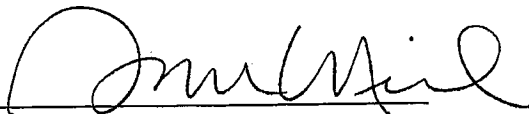
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